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Criminal Law - United States Sentencing Guidelines - Career Offender Status - Defining a "Crime of Violence"

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CRIMINAL LAW—UNITED STATES SENTENCING GUIDELINESS—CAREER OFFENDER STATUS—DEFINING A "CRIME OF VIOLENCE"—The United States Court of Appeals for the Third Circuit held that in determining whether a prior crime qualified as a "crime of violence" for sentencing purposes under the United States Sentencing Guidelines, a sentencing court could inquire into the conduct underlying the prior offense to ascertain whether the conduct presented a "serious potential risk of harm to another."

United States v John, 936 F2d 764 (3d Cir 1991).

In *United States v John*,[1] the United States Court of Appeals for the Third Circuit addressed the question of whether, in determining the existence vel non[2] of a "crime of violence"[3] as a predicate to career offender status for sentencing purposes under the United States Sentencing Guidelines (hereinafter "Guidelines"),[4] a sentencing court could inquire into the actual facts underlying a prior conviction.[5] Alternatively, the court considered whether a sentencing court was limited to an examination of the statutory elements of a prior offense without reference to the actual actions taken by the defendant in perpetration of the crime.[6]

Under Section 4B1.1 of the Guidelines, a defendant over the age of eighteen, convicted of a felony that is either a "crime of violence"[7] or a "controlled substance offense,"[8] is subject to sentenc-

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1. 936 F2d 764 (3d Cir 1991).

2. "Vel non" is defined as "whether or not—used to express a legal situation where something must be done or a given determination must be made or not with no third alternative." *Webster's Third International Dictionary* 2529 (Merriam-Webster, 1986).

3. A "crime of violence" is defined in Section 4B1.2(1) of the Guidelines as:

> Any offense under federal or state law punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

United States Sentencing Guidelines, § 4B1.2 (effective November 1, 1987), codified at 18 USCA App (West, 1989) (hereinafter "Guidelines").

4. Guidelines, § 4B1.1.

5. *John*, 936 F2d at 765.

6. Id.

7. See note 3.

8. A "controlled substance offense" is defined in Section 4B1.2 as:

> [A]n offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance offense (or a counterfeit substance) or the

ing as a career offender if he had at least two prior felony convictions that qualify under either of these two categories.[9] A "crime of violence" is defined in Section 4B1.2(1) of the Guidelines as any offense, under federal or state law punishable by incarceration for more than one year, which: (1) has as an element of the offense "the use, attempted use, or threatened use of physical force against the person of another,"[10] (2) is burglary of a dwelling, arson, extortion, or involves the use of explosives,[11] or (3) otherwise involves conduct by the defendant which "presents a serious potential risk of physical injury to another."[12]

In *John*, the defendant, Keithroy John, was convicted in the District Court of the Virgin Islands of possession of crack cocaine with the intent to distribute.[13] Having been previously convicted of two felonies, assault in the third degree[14] and grand larceny,[15]

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possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute.

Guidelines, § 4B1.2.

9. *John*, 936 F2d at 765; Guidelines, § 4B1.1.

10. *John*, 936 F2d at 767; Guidelines, § 4B1.2(1).

11. Guidelines, § 4B1.2(1).

12. Id.

13. *John*, 936 F2d at 765. Possession of crack with the intent to distribute is a violation of 21 USC § 841(a)(1) (West 1981). Id.

14. § 297. Assault in the Third Degree

Whoever, under circumstances not amounting to an assault in the first or second degree—

(1) assaults another person with intent to commit a felony;

(2) assaults another with a deadly weapon;

(3) assaults another with premeditated design and by use of means calculated to inflict great bodily harm;

(4) assaults another and inflicts serious bodily injury upon the person assaulted; or whoever under any circumstances;

(5) assaults a peace officer in the lawful discharge of the duties of his office with a weapon of any kind, if it was known or declared to the defendant that the person assaulted was a peace officer discharging an official duty—

shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both.

14 VI Code Ann § 297 (1991 Supp).

15. § 1081. Larceny defined and classified

(a) Larceny is the unlawful taking, stealing, carrying, leading, or driving away the personal property of another.

(b) Larceny is divided in two degrees, grand larceny and petit larceny.

14 VI Code Ann § 1081 (1964 & 1991 Supp).

§ 1083. Grand larceny

Whoever takes property—

(1) which is of $100 or more in value; or

(2) from the person of another—commits grand larceny and shall be imprisoned for not more than ten years.

14 VI Code Ann § 1083 (1964 & 1991 Supp).

under Virgin Islands criminal statutes, the critical issue at John's sentencing hearing was whether, under the Guidelines, John should have been sentenced as a career offender.[16] More specifically, the issue turned upon whether John's prior grand larceny conviction qualified as a "crime of violence" under the Guidelines.[17]

The district court held that John's grand larceny conviction qualified as a "crime of violence" for sentencing purposes under the Guidelines.[18] This determination was founded upon the court's findings that: (1) larceny had been listed among those crimes enumerated as a "crime of violence" under the Control, Firearms, and Ammunition Chapter of Title 23 of the Virgin Islands Code[19] and

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16. *John*, 936 F2d at 765. Offenders are sentenced based upon an offense level and a criminal history category. For each statutorily defined offense, the Guidelines assign an offense level. The levels, contained in Chapter Two of the Guidelines, range from one to forty-three. Guidelines, Chapter 2. "Criminal history category" is defined in § 4A1.1 as:

> The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter 5, Part A.
>
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
>
> (c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.
>
> (d) Add 2 points if the defendant committed the instant offense while under any criminal justice system, including probation, parole, supervised release, imprisonment, work release, or escape status.
>
> (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

Guidelines, § 4A1.1. Consequently, if the sentencing court determined that John was not a career offender, then under Chapter 5 Part A of the Guidelines he would have been sentenced within a Guidelines sentencing range of sixty-three to seventy-eight months based on an offense level of twenty-two and a criminal history category of IV. Conversely, if John was determined to be a career offender, then under Chapter 5 Part A of the Guidelines he would be sentenced within a Guidelines sentencing range of 210 to 262 months on the basis of an offense level of thirty-two and a criminal history category of VI. *John*, 936 F2d at 765-66. Under § 4B1.1, a career offender's criminal history category will always be Category VI. Guidelines, § 4B1.1.

17. *John*, 936 F2d at 765. John conceded that his prior assault conviction qualified under the Guidelines as a "crime of violence." Id. Presumably, John agreed that his assault conviction was a "crime of violence" because assault has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another. See note 3.

18. *John*, 936 F2d at 766. The district court's opinion in this case was not published.

19. Id. The Control, Firearms, and Ammunition Chapter of Title 23 of the Virgin Islands Code defines "crime of violence" as:

> The crime of, or the attempt to commit murder, in any degree, voluntary manslaugh-

(2) the description set forth in the presentence investigation report[20] of John's background indicated that the grand larceny conviction qualified as a "crime of violence" under Section 4B1.2(1) of the Guidelines because weapons had been involved in perpetrating the crime.[21] Consequently, John was sentenced as a career offender to 210 months imprisonment.[22]

On appeal to the United States Court of Appeals for the Third Circuit, John's main argument was that the district court erred in: (1) relying upon the Virgin Islands Code's definition of grand larceny, and (2) looking at John's actual conduct during the prior crime to determine whether the crime involved violence.[23] John contended that in determining whether the grand larceny crime was a "crime of violence," the sentencing court's inquiry should have been limited to the statutory elements of the grand larceny offense, which did not include violence as a necessary element of the crime.[24]

The Third Circuit affirmed the district court's judgment of sentence.[25] The court held that in determining whether a prior crime

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ter, rape, arson, mayhem, kidnapping, assault in the first degree, assault in the second degree, assault in the third degree, robbery, burglary, unlawful entry or larceny.

23 VI Code Ann § 451(e) (1990).

20. § 3552. Presentence Reports

(a) Presentence investigation and report by probation officer.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

. . .

(d) Disclosure of present reports.—The Court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

18 USC § 3552 (1986).

21. *John*, 936 F2d at 766. The pre-sentence investigation report, which was examined by the sentencing court as part of the record, described John's underlying conduct in the crime: "The defendant, in concert with two co-defendants, entered a home and threatened the occupants with guns. Cash and other personal property was [sic] taken." Id. John had admitted at the sentencing hearing that the pre-sentence investigation report was accurate in every respect. Id.

22. Id.

23. Id at 767.

24. Id. The Court defined the Virgin Islands statutes under which John was convicted of grand larceny, as "the unlawful taking . . . [of] the personal property of another . . . of $100.00 or more in value." 14 VI Code Ann §§ 1081, 1083 (1964). *John*, 936 F2d at 766. John's contention was based on the United States Supreme Court's decision in *Taylor v United States*, 495 US 575 (1990). For further discussion of *Taylor*, see notes 41, 173-90 and accompanying text.

25. *John*, 936 F2d at 765.

qualified as a "crime of violence" for sentencing purposes under the Guidelines, a sentencing court could inquire into the conduct underlying the prior offense to ascertain whether the conduct presented "a serious potential risk of harm to another."[26] The court also concluded that how a state defined a "crime of violence" in its criminal code was irrelevant to a federal court's determination of whether a prior crime qualified as a "crime of violence" for sentencing purposes.[27]

In concluding that a defendant's conduct in a prior offense could be examined to determine if the crime qualified as a "crime of violence" under the Guidelines, the Third Circuit inferred legislative intent.[28] The court reasoned that, based upon the definition of "crime of violence" in Section 4B1.2(1) of the Guidelines[29] and the explanation of the definition in Application Note 2 to that Section,[30] the United States Sentencing Commission (hereinafter "Sentencing Commission"),[31] in enacting the Guidelines, had envisioned three independent ways by which a prior felony conviction was to be considered a "crime of violence" for sentencing purposes.[32] According to the court, a prior conviction qualified as a "crime of violence" under the Guidelines if: (1) the prior conviction was for a crime specifically enumerated in Section 4B1.2(1)'s definition of "crimes of violence" (for example, murder and manslaughter), (2) the prior conviction was for a crime that, although

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26. Id at 770.

27. Id at 770-71 n 4. The Third Circuit agreed with John's contention that the district court had erred in relying upon the Virgin Islands Code's definition of grand larceny as a "crime of violence," concluding that state and territorial definitions of which crimes qualified as "crimes of violence" were irrelevant to the issue. Rather, under the Guidelines, the determination of whether a prior crime was a "crime of violence" turned solely on those factors specifically listed in Section 4B1.2(1) of the Guidelines. Id.

28. Id at 767.

29. Id. See note 3.

30. *John*, 936 F2d at 767. Application Notes 1 and 2 read:

> 1. The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiracy, and attempting to commit such offenses.
>
> 2. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involves use of explosives or, by its nature, presented a serious potential risk of physical injury to another.

Guidelines, § 4B1.2 commentary.

31. For further discussion of the United States Sentencing Commission, see notes 130-32 and accompanying text.

32. *John*, 936 F2d at 767.

not specifically enumerated in Section 4B1.2(1), had as an element the use, attempted use, or threatened use of physical force, or (3) the prior conviction was for a crime which was neither specifically enumerated nor involved physical force as an element of the offense, but which involved conduct posing a serious potential risk of physical injury to another.[33] Consequently, the court interpreted the third category of Section 4B1.2(1) as permitting the district court to examine John's actual conduct during the grand larceny offense to determine if the offense constituted a "crime of violence."[34]

In so holding, the Third Circuit stated that its conclusion and reasoning were consistent with its decision in *United States v Williams*[35] and unaffected by its decision in *United States v McAllister*.[36] In *Williams*, the court had interpreted an earlier version of Section 4B1.2 to permit a sentencing court to examine a defendant's underlying conduct in a prior crime to determine whether the prior conviction qualified as a "crime of violence" under the Guidelines.[37] In *McAllister*, a case involving a burglary conviction, an offense specifically enumerated as a "crime of violence" under Section 4B1.2, the Third Circuit had held that where the prior crime was one enumerated under the Guidelines as a "crime of violence," an examination of the underlying facts of the crime was inappropriate.[38] Under such circumstances, the court, in *McAllister*, concluded the sentencing court was to take a categorical approach.[39] The court, in *John*, further stated that its conclusion was in accord with the decisions of all other circuits which had considered the issue.[40]

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33. Id.

34. Id at 767-68.

35. 892 F2d 296 (3d Cir 1989), cert denied, US , 110 S Ct 3221 (1990). *Williams* was decided by reference to the text of Section 4B1.2 and the Application Note to the section as they existed prior to an amendment of Section 4B1.2 that became effective November 1, 1989. For further discussion of *Williams*, see notes 148-54 and accompanying text.

36. 927 F2d 136 (3d Cir 1991). For further discussion of *McAllister*, see notes 162-71 and accompanying text.

37. *John*, 936 F2d at 768, citing *Williams*, 892 F2d at 304.

38. *John*, 936 F2d at 770. See note 30 for the language of Application Note 2. See also, in accord, *United States v Gonzalez-Lopez*, 911 F2d 542, 547-48 (11th Cir 1990); *United States v Brunson*, 907 F2d 117, 120-21 (10th Cir 1990).

39. *John*, 936 F2d at 770.

40. Id at 768. See *United States v Goodman*, 914 F2d 696, 699 (5th Cir 1990); *United States v Terry*, 900 F2d 1039, 1041-43 (7th Cir 1990); *United States v Baskin*, 886 F2d 383, 389 (DC Cir 1989), cert denied, 494 US 1089 (1990). For discussion of a case that reached a contrary conclusion, see *United States v Walker*, 930 F2d 789 (10th Cir 1991), discussed at notes 206-09 and accompanying text.

The Third Circuit also concluded that John had incorrectly interpreted the United States Supreme Court's 1990 decision in *Taylor v United States*.[41] John had argued that under *Taylor* a sentencing court was restricted solely to examining the statutory elements of a prior offense when determining whether the offense constituted a "crime of violence" under the Guidelines.[42] To the contrary, the court, in *John*, read *Taylor* as supporting the view that a sentencing court could examine a defendant's underlying conduct in a prior crime to determine whether that conduct posed a sufficient risk of physical injury to another, thus qualifying the offense as a "crime of violence" for sentencing purposes.[43] The Third Circuit interpreted *Taylor* as concluding that a sentencing court was limited solely to looking at the statutory elements of the prior offense, without examination of the particular underlying facts of the crime, only when the predicate conviction being examined was one of the enumerated offenses listed in Section 4B1.2(1)'s definition of "crime of violence."[44]

John also argued in his appeal that the district court had erred when it failed to declare a mistrial in conjunction with the testimony of a Mr. Didier, the alleged buyer of the crack.[45] Prior to Didier's testimony, the Government had suggested that Didier be advised of his rights and furnished with an attorney because he had also been arrested during the alleged drug transaction and was facing charges in the Virgin Islands Territorial Court.[46] This suggestion was made in proceedings outside of the jury's hearing.[47] The defense agreed and Didier was advised of his rights and counsel was appointed to represent him.[48] Didier subsequently testified that no drug transaction had taken place between John and

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41. 495 US 575 (1990). In *Taylor*, the Supreme Court examined whether a prior burglary conviction qualified as a "violent crime" under the sentencing enhancement provision of the Armed Career Criminals Amendment Act of 1986, 18 USCA § 924(e) (West 1991 Supp), a provision which contained language analogous to that of section 4B1.2. For further discussion of *Taylor*, see notes 173-90 and accompanying text.

42. *John*, 936 F2d at 768.

43. Id at 769.

44. Id at 769-70. For example, a sentencing court would be limited solely to looking at the statutory elements of a crime when the prior conviction being examined was a burglary. Id.

45. Id at 766 n 2. When Didier had originally been questioned by the Narcotics Strike Force agents about his encounter with John, he had denied that he and John had engaged in a drug transaction. Id.

46. Id.

47. Id.

48. Id.

himself.[49]

After Didier testified, defense counsel moved for a mistrial, alleging that the Government had suggested Didier be advised of his rights and have counsel appointed to represent him in order to intimidate Didier prior to his testifying.[50] The district court denied the motion.[51] The Third Circuit, in a footnote to the case, affirmed the trial court's decision upon the ground that, because John had consented to the government's suggestion, he could not now complain about the ruling.[52]

In the same footnote, the Third Circuit also dismissed John's argument that the finding of career offender status violated his Fifth[53] and Eighth Amendment[54] rights under the United States Constitution.[55] John had contended that, because of the fifteen-year lapse between his grand larceny conviction and the instant offense and his youth at the time of the grand larceny offense, the sentence imposed on him as a career offender rose to an unconstitutional level of severity.[56]

Concerning John's Fifth Amendment claim, the Third Circuit held that John had not been denied due process.[57] In so holding, the court first stated that Section 4B1.1 implemented Congress' mandate to the Sentencing Commission to assure that career offenders received a sentence of incarceration at or near the maximum term authorized by statute,[58] and John's sentence was two years short of the statutory maximum.[59] Secondly, the court concluded that the Guidelines were constitutional because the career offender legislative scheme bore a rational relationship to a legitimate governmental purpose, namely to prevent recidivist offenders from repeatedly victimizing society.[60] Lastly, the court reasoned

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49. Id.

50. Id.

51. Id.

52. Id.

53. The text of the Fifth Amendment pertinent to John's claim of constitutional violation reads, "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law." US Const, Amend V.

54. The text of the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Amend VIII.

55. *John*, 936 F2d at 766 n 2.

56. Id. John was sixteen at the time he was convicted of grand larceny. Id.

57. Id.

58. 28 USC § 994(h) (1984).

59. *John*, 936 F2d at 766-67.

60. Id at 767.

that similar legislative schemes had survived due process challenges.[61]

John's Eighth Amendment argument was summarily dismissed by the Third Circuit.[62] The court simply concluded that John's sentence was not nearly as severe as other sentences that had survived Eighth Amendment challenges.[63]

Throughout the history of criminal law, four general purposes for sentencing offenders have existed: (1) retributive punishment,[64] (2) deterrence,[65] (3) incapacitation,[66] and (4) rehabilitation.[67] These purposes have been assigned different degrees of priority under the law, depending upon the particular philosophy and beliefs of a given era.[68] For example, under the current federal sentencing guidelines, the purposes for sentencing offenders are primarily to punish, deter, and incapacitate the criminal[69] rather than

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61. Id. See, for example, *United States v Hawkins*, 811 F2d 210, 217 (3d Cir 1987) (the sentencing enhancement scheme in the Armed Forces Criminal amendment to 18 USC App § 1202(a) was upheld as constitutional), and *United States v Frank*, 864 F2d 992, 1009-10 (3d Cir 1988) (court held that a defendant does not have a substantive due process right to individualized treatment in sentencing). *John*, 936 F2d at 767.

62. *John*, 936 F2d at 767.

63. Id. In support of its holding, the Court cited *Rummell v Estelle*, 445 US 263 (1980). In *Rummell*, the Supreme Court upheld a mandatory life sentence where the defendant, previously convicted of two similar minor felonies, had been convicted of obtaining $120.75 by false pretenses. *Rummell*, 445 US 263 (1980).

64. "Retribution" is defined as "something given or demanded in payment. In criminal law, it is punishment based on the theory which bears it name and based strictly on the fact that every crime demands payment in the form of punishment." *Black's Law Dictionary* 1184 (West, 5th ed 1979).

65. "Deterrence" is defined as "the restraint and discouragement of crime by fear (as by the exemplary punishment of convicted offenders)." *Webster's Third New International Dictionary* 617 (Merriam-Webster, 1986).

66. "Incapacitation" is defined as "the act of incapacitating or state of being incapacitated." *Webster's Third International Dictionary* 1141 (Merriam-Webster, 1986).

67. "Rehabilitation" is defined as "investing or clothing again with some right, authority, or dignity. Restoring to a former capacity; reinstating; qualifying again." *Black's Law Dictionary* 1157 (West, 5th ed 1979). Concerning the sentencing of criminals, the object of rehabilitation is to "return the offender to the community as a law abiding citizen." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J Crim L & Criminol 883, 886 (1990). Professor Nagel is a member of the United States Sentencing Commission. For further discussion of the four general purposes for sentencing offenders, see Nagel, 80 J Crim L & Criminol at 887 (cited within this note).

68. Charles J Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv L Rev 1938, 1940-41 (1988).

69. In 18 USC § 3553(a)(2), Congress mandated that in determining the particular sentence to be imposed, a court should consider:

(2) the need of the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

to rehabilitate him into a law-abiding citizen.[70] Similarly, depending upon which purpose for sentencing criminal offenders is dominant at the time, varying degrees of judicial discretion[71] in assigning punishment are incorporated into the sentencing system.[72] For example, when retributive punishment is the dominant objective, judicial discretion is generally limited.[73] Conversely, when rehabilitation is the prevalent purpose for sentencing, judicial discretion is more broad.[74]

The sentencing of criminal offenders can be traced back as far as Mosaic times.[75] Under Mosaic law, the criminal justice system was founded upon canon law, thus embodying a strict code of behavior.[76] Consequently, officials, when sentencing criminals, focused on retributive punishment[77] primarily through the use of summary capital punishment.[78] The crimes and their corresponding punishments were documented and there was little judicial discretion in sentencing.[79]

As the centuries progressed and centralized government rose in Europe, incomplete penal codes increasingly placed the power to determine sentences into the hands of judges.[80] Provided with little direction, judges began to exercise broad discretion in determining the kind and extent of punishment to be imposed within the limits

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(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 USC § 3553(a)(2) (1989).

70. 28 USC § 994(k) reads, "The [United States Sentencing] Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ." 28 USC § 994(k) (1989).

71. "Discretion" is defined as "the power of free decision or latitude of choice within certain legal bounds." *Webster's New Collegiate Dictionary* 362 (Merriam-Webster, 9th ed 1983).

72. Nagel, 80 J Crim L & Criminol at 887 (cited in note 67).

73. Id.

74. Id at 885-86, 893-94.

75. Id at 887.

76. Id.

77. Id. Retributive punishment continued to remain the dominant objective of criminal sentencing throughout the early criminal law history. Id at 888-90. However, this was not always the primary purpose; Roman criminal law's focus was primarily on deterrence. Id at 888.

78. Id at 887. The use of capital punishment was generally the primary method of punishment under the common law, regardless of the crime, until the nineteenth century. William Kuntz, *Criminal Sentencing in Three Nineteenth-Century Cities: A Social History of Punishment in New York, Boston, and Philadelphia* 10 (Garland Publishing, 1988).

79. Nagel, 80 J Crim L & Criminol at 887-88 (cited in note 67).

80. Id at 889.

fixed by law.[81] This discretion led to disparities in sentencing and general discrimination; individuals with common criminal backgrounds who were convicted of similar offenses often received vastly varied sentences.[82]

The eighteenth century, the era of the Enlightenment and the Age of Reason, brought new theories concerning man and society to the forefront of academic thought.[83] In the area of criminal law, these theories spawned a number of critics of the existing criminal justice system and its discretionary sentencing practice.[84] While these critics ultimately were unsuccessful in changing their criminal system, their theories provided the groundwork for those who, in the nineteenth century, successfully reformed the existing criminal justice system, including its sentencing policies.[85]

During the infancy of the United States, the country's federal and state governments generally followed in the steps of the English common law.[86] Accordingly, in the area of criminal law, retributive punishment was the dominant purpose of sentencing with crimes and their punishments being codified in penal statutes.[87] Theoretically, the statutes were designed to provide for a determinate sentencing system whereby the maximum sentence was limited and the judge exercised little discretion when imposing sentence.[88] Realistically, however, judges in fact exercised considerable discretion and consequently, significant disparities prevailed be-

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81. Id.

82. For example, under the common law the clergy and nobility generally were not subject to the same punishments as the rest of the populace. Id.

83. Id at 890.

84. Id. Prevailing amongst these critics was Cesare Beccaria, a pioneer of many of the concepts used in the criminal justice system of today. In his famous work, *On Crimes and Punishments* (1764), Beccaria asserted, inter alia, the following reforms for sentencing criminal offenders: (1) the establishment of legislatively, versus judicially, determined sentences, (2) codification of criminal laws, (3) the elimination of torture and (4) the abolishment of capital punishment, with imprisonment invoked in its place. While Beccaria's work was heavily criticized by the ruling powers and the courts of the time, his ideas had far-reaching significance. They were utilized by philosophers of the latter eighteenth and nineteenth centuries, men such as John Howard, Jeremy Bentham and Samuel Rommilly. These philosophers and writers developed the theoretical basis of "classical criminology," a school of thought which stresses deterrence as its primary goal and emphasizes equality and certainty of punishment as the means to achieve the goal. Id at 891.

85. Id.

86. Id.

87. Id at 892. Generally, capital and corporal punishment were the norm. Id.

88. Id. Some state penal codes (for example, New York) limited the range of available punishments more narrowly than other state codes (for example, Pennsylvania). Kuntz, *Criminal Sentencing in Three Nineteenth-Century Cities* at 43 (cited in note 78).

tween the sentences imposed and the sentences actually served.[89]

Between 1865 and 1880, leading American penologists grew frustrated with the existing criminal sentencing system.[90] These penologists, seeing that retribution generally was not a deterrent of criminal activity, turned to a form of "classical criminology," the school of thought espoused by the Enlightenment reformers a century before.[91] They adopted the philosophy that criminals needed to be incarcerated not merely to be punished, but more importantly, to become rehabilitated and understand the error of their criminal ways.[92]

To achieve the rehabilitation of criminal offenders, the penologists determined that the court systems needed to implement an indeterminate sentencing system[93] in place of the established determinate sentencing system.[94] This was because, the reformers asserted, a system under which a criminal knew that after a period he would certainly be freed provided no incentive for rehabilitation.[95] The penologists reasoned that this was especially true given that, under the determinate sentencing system, chronic overcrowding of prisons, standard use of commutation and good-time laws, and frequent gubernatorial pardons often served to reduce criminal sentences to minimal periods of incarceration.[96]

By the turn of the century, legislatures across the country were taking the reformers' findings seriously.[97] By 1911, twenty-one states had codified an indeterminate sentencing system into their

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89. Id at 354, 456-64.

90. Nagel, 80 J Crim L & Criminol at 893 (cited in note 67).

91. See note 84 and accompanying text.

92. Nagel, 80 J Crim L & Criminol at 894. See note 84 and accompanying text.

93. Alan Dershowitz, the noted legal scholar, defined "the indeterminate sentence" as "a continuum of devices designed to tailor punishment, particularly the duration of confinement, to the rehabilitative needs and special dangers of the particular criminal (or more realistically, the category of criminals)." Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U Pa L Rev 297, 298 (1974).

94. Nagel, 80 J Crim L & Criminol at 893-94 (cited in note 67). The call for adoption of an indeterminate sentencing system was first raised by the National Prison Association in 1870. Sandra Shane-DuBow, Alice P. Brown and Erik Olsen, *Sentence Reform in the United States* 5 (Superintendent of Documents, United States Government Printing Office, 1985). The association, at its annual conference, proposed a system whereby prisoner sentences would be limited only by satisfactory proof of rehabilitation and not by "mere lapse of time." Shane-DuBow, Brown and Olsen, *Sentence Reform in the United States* at 5 (cited within this note).

95. Shane-Dubow, Brown and Olsen, *Sentence Reform in the United States* at 5 (cited in note 94).

96. Kuntz, *Criminal Sentencing in Three Nineteenth-Century Cities* at 457-58 (cited in note 78).

97. Nagel, 80 J Crim L & Criminol at 894 (cited in note 67).

penal codes.[98] The federal court system joined the movement toward the indeterminate sentencing of criminals in 1910.[99]

Under the new federal sentencing system,[100] the discretion in sentencing given to judges was almost boundless.[101] The only limitation upon federal judicial discretion was that the judge had to stay within broad statutory parameters.[102] As long as the statutory limit was maintained, the sentence was not reviewable by the appellate courts.[103] Moreover, the judge did not have to state the basis for his choice of punishment.[104]

Williams v New York[105] illustrates the extent of the discretion available to judges under an indeterminate sentencing system.[106] In *Williams*, the issue was whether a New York sentencing statute[107]

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98. Id.

99. Id. By the 1960s, indeterminate sentencing was the rule throughout the country. Id. See also Shane-DuBow, Brown and Olsen, *Sentence Reform in the United States* at 6 (cited in note 94).

100. Under the federal indeterminate sentencing system, the judge imposed a sentence chosen from a penalty range established by Congress. Then, after one-third of the imprisonment term had been served, a parole board determined what the prisoner's actual length of imprisonment would be based on how long the board determined the prisoner's rehabilitation would take. See generally 18 USC §§ 4163, 4164 and 4205, repealed by Pub L No 98-473 § 218 (a)(4), (5), 98 Stat 3037 (1984). Theresa Walker Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 Emory L J 393 (1991).

101. Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 Cath L Rev 181, 182 n 6 (1985).

102. Comment, 35 Cath L Rev at 182 n 6 (cited in note 101). See also *United States v Tucker*, 404 US 443, 446 (1972).

103. Karle and Sager, 40 Emory L J at 396 (cited in note 100).

104. Id.

105. 337 US 241 (1949). In *Williams*, the defendant had been convicted of murder in the first degree for a homicide committed during a burglary. *Williams*, 337 US at 242. Given the option of recommending the death penalty or life imprisonment, the jury had recommended that Williams be sentenced to life imprisonment. Id. However, the trial judge imposed the death penalty based on information contained in a pre-sentence investigation report. Id. The judge's examination of the report, which revealed personal information about Williams, as well as his criminal history, was permitted under a New York criminal statute. Id at 242-43.

106. *Williams v New York* is the seminal case in the area of sentencing disparity. It is used both by the courts and legal scholars to illustrate the extent of sentencing disparity in the federal and state court systems. See, for example *North Carolina v Pierce*, 395 US 711 (1969); Nagel, 80 J Crim L & Criminol at 895 (cited in note 67); and Ogletree, 101 Harv L Rev at 1941-42 (cited in note 68).

107. Section 482 of the New York Criminal Code provided:

> Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, phychiatric [sic] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

violated the defendant's Fourteenth Amendment right to due process.[108] The sentencing statute allowed the judge to examine facts about the defendant's background that had not been introduced at the trial, because of their irrelevancy to the issue of guilt and were obtained from witnesses whom the defendant had not been permitted to confront.[109]

The United States Supreme Court, in an opinion written by Justice Black, held that the New York statute did not violate the defendant's Fourteenth Amendment right to due process.[110] Justice Black concluded that the right pertained solely to a defendant's right to due process during trial and was inapplicable to a defendant's subsequent treatment after conviction.[111] Thus, the Court concluded, once conviction occurred, different evidentiary rules applied.[112]

In reaching its decision, the Court first reasoned that the New York statute was constitutional based on history.[113] The Court asserted that throughout American legal history, judges had been entitled to exercise their discretion in choosing the kind and extent of punishment to be imposed as long as the penalty was within statutory limits.[114] In *Williams*, the sentence was within the statutory limits.[115]

The Court further opined that there were practical reasons for having different evidentiary rules governing trial and sentencing procedures.[116] The Court explained that rules of evidence for trial were designed narrowly to ensure that: (1) a time-consuming and confusing trial of collateral issues did not occur, (2) a defendant was only judged on the merits of the case, and (3) a jury was not unduly influenced by a defendant's past criminal activity.[117] Conversely, the Court explained, a sentencing judge's job was to determine the type and extent of the punishment which was best for the

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Williams, 337 US at 243.

108. Id.

109. Id.

110. Id at 252.

111. Id at 251.

112. Id at 246.

113. Id.

114. Id. To illustrate, the Court compared the New York statute to then Rule 32 of the Federal Rules of Criminal Procedure. Rule 32 provided that federal judges could examine reports made by probation officers, which gave information about the defendant, as an aid in imposing sentence. Id.

115. Id at 242 n 2.

116. Id at 246.

117. Id at 247.

rehabilitation of the individual defendant.[118] Therefore, to properly determine the necessary rehabilitation, a judge needed to have access to a full range of information about the defendant.[119]

Justice Murphy wrote a dissenting opinion in *Williams*.[120] He agreed with the majority as to the importance of liberal use of probation reports.[121] However, he reasoned that because: (1) the case was a capital case, (2) the jury had unanimously recommended a life sentence, (3) it was conceded that the probation report would not have been admissible at the trial, and (4) the report was not subject to examination by the defendant, William's Fourteenth Amendment right to due process had been violated.[122]

The view in *Williams* that judicial discretion in sentencing was necessary and proper and that offenses should not be given a categorical punishment, remained the dominant opinion on the subject in the United States until the late 1960s. At that time, legal reformers began to strongly critique the indeterminate sentencing system, calling for a resurgence of the retributive justification of punishment.[123] They claimed that the indeterminate sentencing system created: (1) disparity in sentencing, (2) discrimination on the basis of race, sex, level of education, and whether or not the offense was a white-collar crime, and (3) inefficiency of rehabilitation.[124] In place of the indeterminate sentencing system, the reformers lobbied for a determinate sentencing system designed to provide certainty and fundamental fairness for all.[125]

Congress took heed of these educated complaints.[126] By 1975

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118. Id.

119. Id.

120. Id at 252. Justice Rutledge also dissented, but did not write an opinion on his vote and did not join in Justice Murphy's dissenting opinion. Id.

121. Id at 253.

122. Id at 252-53.

123. Ernest W. Schoellkopff, *Ordering the Purposes of Sentencing: A Prologue to Guidelines*, 2 Notre Dame L Rev, Ethics and Pub Policy 503, 512 (1985-87). Judge Marvin Frankel, a former law professor and United States District Judge for the Southern District of New York, led this reform movement. See Marvin Frankel, *Lawlessness in Sentencing*, 41 U Cin L Rev 1 (1972), and Marvin Frankel, *Criminal Sentences: Law Without Order* (1973). The first major systematic critique of the indeterminate sentencing system was conducted by the Working Party of American Friends Services Committee, who wrote *Struggle For Justice* in 1971 about the disparities in the California prison system. Shane-DuBow, Brown and Olsen, *Sentence Reform in the United States* at 9 (cited in note 94).

124. Shane-DuBow, Brown and Olsen, *Sentence Reform in the United States* at 6 (cited in note 94).

125. Id.

126. As empirical studies on sentencing patterns continued to reiterate that rehabilitation was not working to reduce the rate of recidivism, Congress became convinced that not

Congress had introduced the first congressional bill to establish a set of sentencing guidelines based upon determinate sentences.[127]

The culmination of the criticism of the indeterminate sentencing system was the Sentencing Reform Act of 1984.[128] The Act was enacted specifically for the purpose of solving the problems of disparity, discrimination, and excessive leniency, problems which Congress determined were caused by indeterminate sentences and unguided judicial discretion.[129] To combat these problems, the Act established a United States Sentencing Commission (hereinafter "Sentencing Commission"),[130] which was charged with the duty of developing a new sentencing system[131] that was to provide certainty, fundamental fairness, and a structure for judicial discretion.[132]

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enough was known about criminal behavior and how to rehabilitate criminals and thus rehabilitation should not be the prime focus of criminal sentencing. Rep No 225, 98th Cong, 1st Sess 38-40, reprinted in US Code Cong & Admin News 3221-23 (1984).

127. S 2699, 94th Cong, 1st Sess, 121 Cong Rec 37, 563-64 (daily ed, Nov 20, 1975).

128. The Sentencing Reform Act was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub L No 98-473, §§ 211-39, 98 Stat 1837, 1987 (1984), codified in 18 USC §§ 3551-86, 3621-25, 3742 and 28 USC §§ 991-98 (1988). The Comprehensive Crime Control Act was enacted in response to public concern over the rise in the rate of drug use and distribution, violent crime and recidivism. Ogletree, 101 Harv L Rev at 1945 (cited in note 68).

129. Nagel, 80 J Crim L & Criminol at 883 (cited in note 67). The Act had, as its foundation, the four traditional goals for sentencing: (1) retributive punishment, (2) deterrence, (3) incapacitation, and (4) rehabilitation. These goals are listed in 18 USC § 3553(a)(2). For the language of Section 3553(a)(2), see note 69.

130. Under the Act, the Commission was established as an independent agency of the federal judicial branch. It consists of seven voting members and one ex officio, non-voting member, either the Attorney General or his designee. Three members of the Commission must be federal judges and no more than four of the Commissioners can be of the same political party. 28 USC § 991(a) (1989).

131. When the Sentencing Commission first met in 1986, Minnesota, Connecticut, Pennsylvania and Washington had already instituted sentencing guidelines and, therefore, the Sentencing Commission had these examples available for consideration. Ogletree, 101 Harv L Rev at 1943 (cited in note 68).

132. 28 USC § 991(b) provides that the purposes of the Commission are to:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices, and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and cor-

In April of 1987, after conducting extensive public hearings, establishing a substantial research program, and meeting with a multitude of criminal law authorities, the Sentencing Commission presented the United States Sentencing Guidelines to Congress for review.[133] On November 1, 1987, the Guidelines became law.[134]

Judicial discretion was not eliminated under the Guidelines; rather, it is more structured and limited.[135] A sentencing judge must follow the Guidelines unless an atypical situation arises where the facts of the case reveal a situation which the sentencing judge thought the Commission had not addressed in the Guidelines.[136] Then, if the defendant is sentenced outside of the Guidelines' range for the offense committed, the judge must state the basis for his decision.[137] The sentence is then reviewable by the appellate courts.[138]

The extent to which a judge's discretion in sentencing is limited by the Guidelines can be seen by examining how a judge must deal with recidivist offenders.[139] Where a defendant is a repeat offender, the judge must turn to the Guidelines and determine whether, under Sections 4B1.1 and 4B1.2, the defendant qualifies as a "career offender"[140] and, thus, must be subjected to a sentence en-

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rectional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 USC § 991(b) (1989).

133. Guidelines, Chapter One, Part A(2).

134. Id.

135. For example, the Guidelines control the judge in his sentencing in that where the Guidelines call for imprisonment, the maximum imprisonment length does not exceed the minimum imprisonment length by more than twenty-five percent or six months. 28 USC § 994(b)(2) (1989). Moreover, the Guidelines must be neutral as to the race, sex national origin, creed and social-economic status of offenders. 28 USC § 994(d) (1989).

136. 18 USC § 3553(b) (1989).

137. 18 USC § 3553(c)(2) (1989).

138. Where the sentence imposed is outside the Guidelines range for the criminal offense committed, the appellate court may review the reasonableness of the departure. 18 USC § 3742 (1988). Where the sentence is within the range prescribed by the Guidelines, the appellate court may still review the sentence to see if the Guidelines were properly applied. Id.

139. It was Congress' intent when enacting the Sentencing Reform Act to impose strict sentences for repeat offenders; Section 994(h) of title 28 mandated that the Commission, in dealing with "career offenders," ensure that the sentences imposed by judges be "at or near the maximum term authorized under the Guidelines." 28 USC § 994(h) (1989). The legislative history of Section 994(h) indicates that the phrase "maximum term authorized" is to be construed to mean the maximum term authorized by statute. See S Rep 98-225, 98th Cong, 1st Sess (1982) ("Career Crimes" amendment No 13 by Senator Kennedy), 12796 (explanation of amendment) and 12798 (remarks by Senator Kennedy). Thomas H. Hutchinson and David Yellen, *Federal Sentencing Law and Practice* 316 (West, 1989).

140. For the definition of "career offender," see note 16 and accompanying text.

hancement.[141] The judge no longer can independently make such a determination.

That the sentencing judge's discretion is not completely eliminated, however, can be seen from comment three to Section 1B1.2 of the Guidelines.[142] In comment three, the Guidelines state that there will be circumstances in which it will be appropriate for the sentencing court to examine the actual conduct of the offender, even though that conduct is not a statutory element of the conviction.[143]

The Guidelines were not at first accepted by the third circuit federal courts.[144] Like many of the federal courts throughout the country, the third circuit courts questioned the constitutionality of the Sentencing Reform Act.[145] As a result, until the United States Supreme Court upheld the constitutionality of the Act in *Mistretta v United States*,[146] the third circuit courts consistently held

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141. A career offender's criminal history category will be a Category IV in every case. Guidelines, § 4B1.1. It is this categorization which causes the significant enhancement of the defendant's punishment. Id.

142. Comment three to Section 1B1.2 reads:

> In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. See 1B1.3 (Relevant Conduct) and 4B1.4 (Information to be Used in Imposing Sentence).

Guidelines, § 1B1.2.

143. Id.

144. See, for example, *United States v Frank*, 682 F Supp 815 (W D Pa 1988) (the Sentencing Reform Act, by mandating that Article III judges serve on an executive commission and perform executive duties and functions, violates the separation of powers doctrine); *United States v Whyte*, 694 F Supp 1194 (E D Pa 1988) (the Sentencing Reform Act and its Guidelines violated the separation of powers doctrine by placing the Sentencing Commission in the judicial branch which has no authority to legislate or execute sentences binding upon all judges); and *United States v Brown*, 690 F Supp 1423 (E D Pa 1988) (the Sentencing Reform Act, by locating the Sentencing Commission which was to promulgate sentencing guidelines within the judicial branch, violated constitutional separation of powers doctrine).

145. See note 144 and accompanying next.

146. 488 US 361 (1989). In *Mistretta*, the issue was whether the Guidelines were unconstitutional because the United States Sentencing Commission constituted both a violation of the separation of powers doctrine and an excessive delegation of authority by Congress. *Mistretta*, 488 US at 370. The defendant, Mistretta, had been convicted in a Missouri federal district court of one count of conspiracy and agreement to distribute cocaine in violation of 21 USC §§ 846 and 848(b)(1)(B). Id. The United States Supreme Court, in an opinion written by Justice Blackmun, dismissed Mistretta's claim and accordingly upheld the constitutionality of the Guidelines. Id at 412. Stating that while the Sentencing Com-

the Guidelines unconstitutional.[147] Therefore, the Third Circuit's interpretations of the Guidelines' definition of a "crime of violence" are limited in number.

The first case in which the Third Circuit examined the definition of a "crime of violence" under the Guidelines was *United States v Williams*.[148] In *Williams*, the court faced the issue of whether the possession of a gun by a convicted felon constituted a "crime of violence" as that term was defined in Section 4B1.2(1) of the Guidelines.[149] The district court, in sentencing Williams, determined that the possession of a gun by a convicted felon was a "crime of violence" under Section 4B1.2.[150] Therefore, because the defendant had been previously convicted of three "crimes of violence" under state law, the court sentenced him as a career offender.[151]

On appeal, the Third Circuit affirmed the lower court's judgment of sentence, holding that Williams qualified as a career offender under the Guidelines.[152] The Third Circuit so held on the basis of the Application Note to Section 4B1.2, which stated in pertinent part:

> Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of force would be covered; conviction for an escape by stealth would not be covered.[153]

The Third Circuit reasoned that, by analogy to the Application Note's escape example, William's firing a gun at another while possessing it constituted a "crime of violence" under Section 4B1.2(1)

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mission was "an unusual hybrid of structure and authority," it was constitutional in both structure and effect. Id.

147. See note 144 and accompanying text.

148. 892 F2d 296 (3d Cir 1989).

149. *Williams* examined Section 4B1.2(1) prior to its amendment of November 1, 1989. At the time of Williams' conviction, Section 4B1.2 provided that a "crime of violence" for purposes of sentencing was defined by 18 USC § 16. Section 16 defines a "crime of violence" as:

> The term "crime of violence" means—
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) by any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 USC § 16 (1989).

150. *Williams*, 892 F2d at 304.

151. Id.

152. Id.

153. Id, citing Guidelines, § 4B1.2 commentary.

of the Guidelines.[154]

Soon after the Third Circuit's decision in *Williams*, Section 4B1.2 and its definition of a "crime of violence" were amended.[155] The congressional intent underlying the modifications was the clarification of what the term "crime of violence" meant under the Guidelines.[156] Congress was dissatisfied with the inconsistent manner in which the courts of appeals were interpreting the term.[157]

Specifically, the alteration of Section 4B1.2 was two-fold. First, the amended section included a complete definition of the term "crime of violence," one that was derived from Section 924(e) of the Career Criminals Amendment Act of 1986.[158] Previous to the amendment, Section 4B1.2(1) had only included a reference to the definition of "crime of violence" used in Section 16 of the Comprehensive Crime Control Act of 1984.[159] Second, an explanation of "crime of violence," as the term was used under Section 16 of the Comprehensive Crime Control Act, was deleted from the Application Notes of Section 4B1.2.[160] Inserted in its place was an explanation of the Section's amended definition of a "crime of violence."[161]

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154. *Williams*, 892 F2d at 304.

155. The changes made in the Guidelines were effective November 1, 1991.

156. United States Sentencing Commission, *Federal Sentencing Guidelines Manual* 556 (West, 1991).

157. In determining whether a crime was a "crime of violence," the Fifth, Sixth and Seventh Circuits permitted consideration of underlying conduct. *United States v Flores*, 875 F2d 1110, 1112 (5th Cir 1989); *United States v Maddalena*, 893 F2d 815, 820 (6th Cir 1989); and *United States v McNeal*, 900 F2d 119, 122-23 (7th Cir 1990). The Ninth and Eleventh Circuits did not allow consideration of underlying conduct. *United States v Becker*, 919 F2d 568 (9th Cir 1990); *United States v Selfa*, 918 F2d 749 (9th Cir 1990); *United States v Gonzalez-Lopez*, 911 F2d 542, 547 (11th Cir 1990).

158. 18 USC § 924(e) provides a sentence enhancement for a defendant convicted under 28 USC § 922(g) of unlawful possession of a firearm when the defendant has three prior convictions for a violent felony or a serious drug offense or both. Section 924(e)(2)(B) defines a violent felony as:

> Any crime punishable by imprisonment for a term exceeding one year that—
> (i) has as an element that use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 USC § 924(e) (1989).

159. The definition of "crime of violence" in 18 USC § 924(e) and 18 USC § 16 are the same except that 18 USC § 16(a) includes the use of force against property in addition to the use of force against persons. *McAllister*, 927 F2d at 138 n 2.

160. United States Sentencing Commission, *Federal Sentencing Guidelines Manual* 481 (West, 1990).

161. Id. See note 30 and accompanying text for the language of amended Application Note 2.

The Third Circuit examined Section 4B1.2(1)'s amended definition of a "crime of violence" in *United States v McAllister*.[162] The issue in *McAllister* was whether the defendant's two prior convictions for robbery were "crimes of violence" under the Guidelines.[163] McAllister had been convicted of a number of crimes, three of which were "controlled substance offenses."[164] At the sentencing hearing, the pre-sentence investigation report indicated that McAllister had four prior adult convictions, two of which were robberies.[165] McAllister requested that he not be sentenced as a career offender. The sentencing judge agreed, stating that because the facts of the predicate convictions were sufficiently ambiguous,[166] he could not say that both crimes were "crimes of violence" as the term was meant in the Guidelines.[167]

On appeal, the Third Circuit held that the two robbery convictions were per se "crimes of violence" and thus McAllister should have been treated as a career offender for sentencing purposes.[168] The court's holding was chiefly predicated upon: (1) Section 4B1.2(1)(i) of the Guidelines, which provided that a "crime of violence" means any offense, either under federal or state law, punishable by imprisonment for more than one year that has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another, and (2) Application Note 2 to Section 4B1.2, which expressly stated that robbery was a "crime of violence."[169]

The court also acknowledged that such a categorical approach to determining whether a prior crime was a "crime of violence" under

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162. 927 F2d 136 (3d Cir 1991).

163. *McAllister*, 927 F2d at 138.

164. Id at 137. For the Guidelines' definition of "controlled substance offense," see note 8.

165. *McAllister*, 927 F2d at 137. Concerning the robberies, the investigation record revealed that: (1) in the first robbery the defendant had stolen $190 from a female victim by grabbing her arm and taking the money from her, and (2) in the second robbery, McAllister and two other individuals had attacked a gentleman and stolen his wallet. Id. In describing the first robbery, the report indicated that a weapon had not been used in perpetrating the crime; there was no mention of use of weapons in the description of the second robbery. Id.

166. See note 165 and accompanying text.

167. *McAllister*, 927 F2d at 137-38.

168. Id at 138-39.

169. Id at 138. The court also noted the significance of Application note 3 to Section 4B1.2, which provided that "a prior felony conviction" was a federal or state conviction for a crime punishable by death or imprisonment for more than one year, irrespective of whether the offense was specifically designated as a felony and regardless of the actual sentence imposed. Id.

Section 4B1.2 might not always be possible.[170] Therefore, the court suggested that a more detailed factual inquiry might be necessary when the offense in question is not specifically listed as a "crime of violence" in the Application Notes to Section 4B1.2.[171]

Because, as amended, Section 4B1.2(1) adopted a definition of "crime of violence" derived from Section 924(e) of the Career Criminals Amendment Act of 1986,[172] it is necessary to examine how the definition, termed a "violent felony" under Section 924(e), has been interpreted by the United States Supreme Court. The most recent analysis of the section is found in the Supreme Court's decision in *Taylor v United States*.[173]

In *Taylor*, Justice Blackmun, writing for the majority,[174] examined the issue of whether a defendant's prior burglary convictions were "violent felonies" as the term "burglary" was used in Section 924(e) of the Career Criminals Amendment Act.[175] The defendant argued that his two burglary convictions were not "violent felonies" because the burglary convictions did not, as required in Section 924(e)(2)(B)(ii), involve conduct that presented a serious potential risk of physical injury to another.[176]

In analyzing the issue, the Supreme Court first examined what elements Congress meant to include in the term "burglary."[177] The Court held that Congress, in enacting Section 924(e), had intended "burglary" to be used in the modern generic sense, similar to its use in the majority of the states' criminal codes.[178] Consequently,

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170. Id at 139.

171. Id. In support of this proposition, the court cited *Williams*, 892 F2d at 303-04 (see note 142 and accompanying text); *United States v Gonzalez-Lopez*, 911 F2d 542, 547-48 (11th Cir 1990); and *United States v Brunson*, 907 F2d 117, 120-21 (10th Cir 1990). *McAllister*, 927 F2d at 139.

172. See note 158 and accompanying text.

173. 495 US 575 (1990).

174. Justice Blackmun's opinion was joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Stevens, O'Connor and Kennedy. Justice Scalia joined in all but Part II of the opinion, which dealt with the legislative history of Section 924(e). *Taylor*, 495 US at 575. Justice Scalia issued an opinion concurring in part and concurring in the judgment. His concurrence essentially stated that the Court should not have devoted ten pages of the opinion to the legislative history of Section 924(e) after having held that the term "burglary," as used in the statute, had a contemporary plain meaning which was to be given effect and which was not to be modified by the rule of lenity. Id at 602-03.

175. For the definition of "violent felony," see note 158.

176. Section 924(e)(2)(B)(ii) provides that "violent felony" "means any crime punishable by imprisonment for a term exceeding one year that—
(ii) is burglary. . .or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 USC § 924(e)(2)(B)(ii) (1989).

177. *Taylor*, 495 US at 577.

178. Id at 599. The elements of a "generic" burglary are unlawful or unprivileged en-

the Court concluded that a defendant should be viewed as having been convicted of "burglary," as the term is used in Section 924(e), if either: (1) the offense's statutory definition substantially corresponded to the "generic" burglary offense,[179] or (2) the charging paper and the jury instructions for the prior offense actually required the jury to find all of the elements of a "generic" burglary in order to convict the defendant.[180]

In holding that the term "burglary" was to be construed in its modern "generic" sense, the Court based its reasoning on the legislative history of Section 924(e).[181] The Court reasoned that from the section's legislative history,[182] it was clear that Congress' intent was that a categorical approach to "burglary" be used by the courts and that the category encompass the generic elements of burglary.[183] Specifically, the Court stated that the section's legisla-

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try into, or remaining in, a building or other structure, with intent to commit a crime. Id.

179. Id at 602.

180. Id. In reference to Taylor's specific case, because not all of the Missouri burglary statutes in existence at the time of Taylor's conviction included the requisite generic burglary elements listed by the Court, the Court ordered a remand for further determinations consistent with the Court's opinion. Id.

181. Id at 581-88.

182. The legislative history of Section 924(e) indicated that Congress enacted the first version of the sentence enhancement provision in 1984 and that the provision contained a definition of "burglary." In 1986, the provision was recodified at 18 USC § 924(e); at that time, the provision's definition was slightly amended. The sentence enhancement provision was amended again five months later. This amendment is the present form of Section 924(e). The amendment made three changes: (1) the list of predicate offenses which qualified as "violent felonies" was expanded from "robbery or burglary" to "a violent felony or a serious drug offense," (2) the provision defined "violent felony" to include burglary, and (3) the pre-existing definition of burglary was deleted. Id at 582.

183. In determining that Congress meant "burglary" in Section 924(e) to mean burglary in its generic sense, the Court dismissed the Eighth Circuit's reasoning that Congress intended the meaning of burglary for the purposes of Section 924(e) to depend on the definition of burglary adopted by the state of conviction. Id at 590. In dismissing this analysis, the Court asserted that such an analysis could not be accurate because its application would lead to arbitrary results and the purpose of the Guidelines was to provide uniformity in sentencing. Id at 591. To illustrate this point, the Court explained that under the Eighth Circuit's analysis, whether or not a person would receive a sentencing enhancement would depend solely on whether his prior criminal conduct was termed a "burglary" under state law. Id.

The Court also dismissed the argument used by some of the courts of appeals that Congress intended the uniform definition of "burglary" in Section 924(e) to refer to burglaries involving the elements of common law burglaries. Id at 594. It dismissed this theory on the ground that the modern understanding of "burglary" had so far diverged from its common law roots that to adopt this categorical approach would prevent many of the repeat offenders who should be given sentencing enhancement under Section 924(e) from so being given and thus the purpose of the provision would largely be nullified. Id. To illustrate, the Court noted that many state statutes had expanded their definitions of "burglary" to include entry, without breaking, into structures other than dwellings and entry with intent to commit

tive history indicated that, while the amendment to Section 924(e) was enacted to expand the coverage of the Act, the definition of "burglary" was to be left as it existed prior to the amendment.[184] Therefore, the Court concluded that because there was nothing in the legislative history to show that Congress was dissatisfied with its "generic" definition of burglary, and much in that history to support the position that Congress was satisfied with its pre-existing definition, the deletion of the definition in the amendment was a mere inadvertent error in the drafting process.[185] The preexisting definition was still to be utilized by the courts when examining predicate offenses.[186]

Having established the proper construction of "burglary" as the term was used in Section 924(e), the Court in *Taylor* next turned to the question of whether, in applying Section 924(e), a sentencing court could look only to the statutory definition of the prior burglary offense or, alternatively, whether a court could look to the particular facts underlying the offense.[187] The Court held that, generally, a sentencing court could look only to the statutory definition of the prior offense and not to the underlying facts of the

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a crime other than a felony. Id at 593. The Court concluded its dismissal by stating that, absent a specific indication of congressional intent, it was the Court's policy not to adopt a definition which it believed was so ill-suited to a statute's purpose. Id at 594.

Lastly, the Court dismissed Taylor's theory that Congress intended "burglary" in Section 924(e) to mean only those burglaries which elements for conviction included "conduct that presents a serious risk of physical injury to another." Id at 597. The Court stated that such a conclusion would be illogical because if it had been Congress' intent, there was no reason to specifically add the word "burglary" to Section 924(e)(2)(B)(ii) since the provision already included any offense which "involves conduct that presents a serious potential risk of physical injury to another." Id. Furthermore, the Court made note of the fact that the provision used the unqualified language "is burglary" and stated that, had Congress intended to include only certain burglaries as predicate offenses, it would not have chosen such unequivocable language. Id.

184. Id. Senator Specter, who introduced Senate Bill 2312, stated that "since the enhancement provision had been in effect for a year and a half, and 'has been successful with the basic classification of robberies and burglaries as the definition for 'career criminal,' the time has come to broaden that definition so that we may have greater sweep and more effective use of this important statute.' " 132 Cong Rec 7697 (1986).

185. *Taylor*, 495 US at 589-90.

186. Id at 590.

187. Id at 602. The Court examined this issue because it acknowledged that while there was no difficulty in applying Section 924(e) when the state statute's definition of "burglary" was narrower than the generic view of burglary (in that conviction under the state statute necessarily implied that the defendant had been deemed to have committed all the elements of generic "burglary"), it perceived that problems could arise when the state statute under which the defendant was convicted varied substantially from the generic definition. Id at 599-600.

burglary.[188] The Court based its conclusion upon the grounds that: (1) the language of Section 924(e) suggested that Congress' intent was that the sentencing court, when looking at burglary convictions, restrict its examination solely to the fact of conviction, (2) the legislative history of Section 924(e) revealed that Congress generally took a categorical approach to predicate offenses, and (3) allowing a factual inquiry presented practical difficulties and the possibility of unfairness because the sentencing court would, in fact, have to conduct a mini-trial before imposing sentence.[189] The Court completed its analysis by stating that the only exception to this general rule concerning burglary was when the state statute was non-generic and a jury actually was required to find all the elements of generic burglary.[190]

The Third Circuit's conclusion in *United States v John* was that, in determining the existence vel non of a "crime of violence" as a predicate to career offender status under the Guidelines, a sentencing court could inquire into the actual facts underlying a prior conviction to determine whether it "present[ed] a serious potential risk of physical injury to another."[191] Such a conclusion was not revolutionary; it is consistent with the precedent established by the Third Circuit in *United States v Williams*[192] and *United States v McAllister*.[193] It is also consistent with the decision of the Supreme Court in *United States v Taylor*[194] because the Court, in footnote nine of *Taylor*, stated that its holding in the case did not prevent prosecutors from arguing that any prior crime, including offenses similar to generic burglary, was a "crime of violence" because it "involved conduct that present[ed] a serious potential risk of physical injury to another."[195]

Moreover, the Third Circuit's conclusion was fully in accord with the reasons why Congress enacted the Guidelines, namely to elimi-

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188. Id at 602. Significantly, the Court in a footnote to this analysis stated:
> Our present concern is only to determine what offenses should count as "burglaries" for enhancement purposes. The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).

John, 936 F2d at 769 n 9.

189. *Taylor*, 495 US at 600-01.

190. Id at 602.

191. *John*, 936 F2d at 770.

192. For discussion of *Williams*, see notes 148-54 and accompanying text.

193. For discussion of *McAllister*, see notes 162-71 and accompanying text.

194. For a discussion of *Taylor*, see notes 173-90 and accompanying text.

195. *John*, 936 F2d at 769 n 9. See note 188.

nate disparity, discrimination, and excessive leniency in sentencing and to provide certainty and fairness in place thereof.[196] By examining underlying conduct, defendants with similar criminal histories who were convicted of the same crime will be sentenced for similar periods of incarceration. Recidivist offenders will be unable to escape "career offender" status merely because they had been able, earlier in their criminal careers, to negotiate for a lesser conviction in exchange for a guilty plea or because the prosecution had settled for a lesser conviction. Lastly, allowing an examination of a defendant's actual conduct in prior crimes furthers Congress' mandate to the Sentencing Commission that the Commission was to ensure that repeat offenders be sentenced at or near the maximum term possible when the defendant had: (1) been convicted of a "crime of violence" and (2) previously been convicted of at least two felonious "crimes of violence."[197]

Merely because the Third Circuit correctly applied the existing law, however, does not mean that Section 4B1.2 is without fault. Specifically, Application Note 2 to Section 4B1.2, which allegedly explains how a sentencing court is to determine whether a prior crime is a "crime of violence" for sentencing purposes, is wholly inadequate.[198] Therefore, a critique of Application Note 2 must be made.

As stated, one of the purposes of the November 1, 1989 amendment to Application Note 2 of Section 4B1.2 was to clarify the definition of a "crime of violence."[199] Yet, when the Sentencing Commission deleted the examples of what offenses were to be construed as "crimes of violence" without further explaining what the Commission meant by "[o]ther offenses are [crimes of violence] . . . where . . . the conduct . . . by its nature, present[ed] a serious potential risk of physical injury to another," the Sentencing Commission failed in its attempt to clarify the term. Rather, it made the understanding of what is a "crime of violence" even more ambiguous. This constitutes a problem because: (1) the law is clear that the commentary accompanying a Guideline's provision, which includes application notes, must be considered in interpreting the provision,[200] and (2) one of Congress' main goals in enacting the

196. 28 USC § 991(b)(1)(B) (1988). See note 132.

197. 28 USC § 994(h) (1988).

198. For the language of Application note 2, see note 30.

199. See note 156 and accompanying text.

200. Guidelines, Chap 1 Part 1, intro, 1 et seq. See also *United States v Anderson*, 942 F2d 606 (9th Cir 1991), and *United States v White*, 888 F2d 490, 497 (7th Cir 1990).

Guidelines was to create a uniform sentencing system and the definition in Section 4B1.2 is not being applied consistently.[201]

Evidence that Application Note 2 has failed to clarify which predicate offenses are to be considered a "crime of violence" can be seen in the few cases decided by the other federal courts of appeals[202] under the November 1, 1989 amendments to the "Career Offender" section of the Guidelines.[203] For example, the Eighth Circuit in *United States v Cornelius*[204] agreed with the Third Circuit's holding in *John* that Section 4B1.2 and Application Note 2 allowed a sentencing court to look beyond the statutory elements of the prior offense to the underlying facts of the crime to determine whether it constituted a "crime of violence."[205] Conversely, in *United States v Walker*,[206] the Tenth Circuit, while interpreting Section 4B1.2 and Application Note 2 to mean that a sentencing court could examine a defendant's conduct to determine whether the contemporary offense was a "crime of violence,"[207] inferred that a sentencing court could not examine the underlying facts of a defendant's conduct when attempting to determine whether prior offenses qualified a defendant as a "career offender" for sentencing purposes.[208] The Tenth Circuit seemed to conclude that, when examining prior crimes, a sentencing court was restricted to taking a categorical approach and to looking solely to the statutory elements of a prior offense.[209]

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201. See footnote 132 and accompanying text.

202. Several district courts have also recently examined Section 4B1.2 and Application Note 2. See *United States v Tidswell*, 767 F Supp 11, 15 (D Me 1991) (a sentencing court must examine a defendant's underlying conduct to determine whether his conviction for possession of a firearm by a convicted felon is a "crime of violence"); *United States v Coble*, 756 F Supp 470, 474 (E D Wash 1991) (the law is clear that when determining whether a prior conviction is a "crime of violence" the nature of the offense is to be the determining factor, not the underlying facts of the crime; however, when determining whether the instant offense is a "crime of violence," a court may look at the defendant's underlying conduct); and *United States v Hernandez*, 753 F Supp 1191, 1198 (S D NY 1990) (Section 4B1.2 and its Application Note 2 compel a holding that a sentencing court is confined to examining the charged conduct and not the underlying facts of that conduct).

203. Significantly, all of the circuit courts of appeals cases which were cited by the Third Circuit in the instant case as being in accord with its holding were decided by applying the "crime of violence" definition of 18 USC § 16. See note 41 and accompanying text.

204. 931 F2d 490 (8th Cir 1991).

205. "We . . . hold that courts should look beyond the mere statutory elements of a crime when determining whether an offense is a crime of violence." *Cornelius*, 931 F2d at 493.

206. 930 F2d 789 (10th Cir 1991).

207. *Walker*, 930 F2d at 793.

208. Id at 793-94.

209. Id.

Consequently, by not properly clarifying what offenses are to be considered "crimes of violence" for sentencing enhancement purposes, the Sentencing Commission has created a situation where uniformity in sentencing will not prevail. As the above cases reveal, a defendant's fate in front of a sentencing court apparently can differ depending upon the federal circuit in which he had been convicted.

Indeed, *John* presented a perfect example of the problem the Sentencing Commission created with Application Note 2. It appears that had John been convicted in the Tenth Circuit, the sentencing court, under *Walker*, would have been limited to examining the statutory elements of the crime charged. Therefore, since grand larceny inherently does not have as an element "a serious potential risk of physical injury to another," John would not have been sentenced as a career offender and his sentence would not have been elevated.

To permit such disparity is to ignore the impetus behind Congress' enactment of the sentencing reforms;[210] allowing these goals to be so easily circumvented based on how a particular circuit interprets Section 4B1.2 and its Application Note is contrary to the spirit of the Guidelines.[211] Therefore, the Sentencing Commission needs to once again reexamine Application Note 2 to Section 4B1.2 and truly clarify the meaning of the term "crime of violence." The sentencing of career offenders is too important to allow such ambiguity to continue.

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210. See note 129 and accompanying text.
211. See note 132 and accompanying text.